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No. 85-1129

In The
Supreme Court of the United States
October Term, 1986

PAUL E. JOHNSON,
Petitioner,

vs.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEES UNION LOCAL 715,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA

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QUESTION PRESENTED

May an employer, pursuant to a voluntary affirmative action plan which set no quotas or rigid preferences, consider gender as a factor in the decision to promote a qualified woman where women had been virtually excluded from the job category and where the employer had grounds to conclude that its own past practices may have been discriminatory?

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STATEMENT OF THE CASE

A. Introductory Facts and Background

Petitioner, Paul E. Johnson, filed this Title VII action against the respondent, Santa Clara County Transportation Agency [hereinafter referred to as the Agency][1], after the Agency promoted a well-qualified woman, Diane Joyce, to the skilled craft position of Road Dispatcher which the petitioner had also sought. A number of factors influenced the Agency's promotional decision, including its Affirmative Action Plan for increasing the employment of women in jobs where they had not traditionally been employed by the Agency. The justification for that Plan and its application to the promotion of Joyce are the focus of the case here as they were below.

B. The Challenged Promotion Decision

On December 12, 1979, the Agency announced a vacancy for the promotional position of Road Dispatcher in the Agency's Roads Division. Road Dispatchers assign crews, equipment and materials, and maintain records pertinent to road maintenance jobs. The minimum qualifications for the position were four years of previous dispatch experience or four years of road maintenance work for the County of Santa Clara. J.A. 23-25. At the time of this vacancy, the Agency had never employed a woman as a Road Dispatcher and employed no women in any other skilled craft job. J.A. 49.

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[1]The Santa Clara County Transportation Agency is an agency of the County of Santa Clara, a political subdivision of the State of California. J.A. 6. The job in question was in the Roads Division, one of seven divisions in the Agency (Administration, Aviation, Fleet, Roads, Bus Maintenance, Service, Transportation Development) Tr. 14-15.

By the final filing date of December 29, 1979, twelve County employees had applied for the promotion. No written test was administered. Tr. 57. Nine of the applicants were interviewed by a two-person oral board, which ranked William Kinnear first with a rating of 80. Petitioner Johnson was tied for second with a rating of 75. Joyce ranked next with a rating of 73. Three others also placed on the qualified list with ratings of 70 or 71. J.A. 26.

Under the Agency's civil service rules, the appointing authority had discretion to select any person who ranked among the top seven persons on a qualified list. Under this "Rule of Seven," the appointing authority had the discretion to appoint "a less qualified person over one rated as better qualified so long as both are within the top seven on the list." Pet. 4a (District Court Findings of Fact); *see also* Tr. 19.

Roads Division employees conducted their own interviews of the top candidates. Joyce believed that the interviewers on the second oral interview panel would not give her fair consideration. Her past experience with members of the panel led her to believe they were biased against her because of her sex. Tr. 81-82, 91. Previously, Joyce had filed a grievance against one of the panelists, James Baldanzi, because he repeatedly denied her requests for protective work clothing, although he routinely issued such clothing to male employees. Tr. 89-92. Joyce sat on a safety committee with another member of the panel, Glenn Foreman, and Joyce believed his continuous disagreements with her reflected his bias against her because of her sex. Tr. 82, 91. Joyce's concerns about this bias increased when the second oral interview was scheduled exactly at a time during

which, as she had previously notified the Superintendent,[2] she had planned to attend a work-related class. Tr. 95. Also, Joyce had heard rumors that Johnson had the job "sewed up" (Tr. 91), and she believed that "if that rumor is true, then all [candidates] above and beneath me were treated unfairly." Tr. 93.

The second oral board recommended that Petitioner Johnson be hired. Baldanzi testified that he regarded Joyce as a "rebel rousing, skirtwearing person," and "not a lady." Tr. 153, 161. He stated that Joyce "didn't have the experience that I was really looking for at the time." He testified that he believed she had only one-and-a-half or two years of road work experience, when in fact Joyce had almost five years of such experience. Tr. 151-153; J.A. 27.

Joyce called the County's Affirmative Action Office to express her concern that she might not be receiving fair consideration for the job. Tr. 95. In addition to her misgivings about possible bias on the second panel, Joyce was concerned as a result of past experiences which she believed were discriminatory. *See infra* pp. 8-9.

The Agency's Affirmative Action Coordinator, Victor Morton, reviewed the qualifications of the candidates and recommended to the Agency's Director, James Graebner, that Joyce receive the promotion. Tr. 26. The head of the Roads Division recommended Petititoner Johnson, but agreed that Joyce had performed well in her duties (Tr.

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[2]Subsequent to her appointment to the Road Dispatcher position, this Superintendent initially told Joyce that she got the job even though she was "not qualified." Tr. 100. This same Superintendent told Johnson that he had already been appointed, but "affirmative action got it reversed." Tr. 139, 194.

71) and was capable of performing the Road Dispatcher work. Tr. 25. Graebner questioned both the Affirmative Action Officer and the head of the Roads Division and found that they had "an honest difference of opinion" as to the qualifications of both candidates. Tr. 69. Graebner considered the matter for several hours over the course of a few weeks (Tr. 63), and concluded that the two candidates were equally capable of performing the work.[3] He then chose Joyce for the position based upon a number of factors. "I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that. I believe it was a combination of all of those." Tr. 68.

Graebner also took into consideration the Agency's obligation "to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis." Tr. 49. Graebner was concerned about the fact that out of 238 skilled craft Agency employees, none were women; and that no women had even been employed in nonclerical positions in the Agency's Roads Division, with the exception of Joyce. Tr. 33, 210-11.

The disputed promotional decision was not Graebner's first implementation of the affirmative action plan. He had applied affirmative action considerations to make the

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[3]Director Graebner did not consider the difference in oral board scores of a couple of points to be a very significant factor in the decision making process. Tr. 57-58. He stated, "I knew they were relatively close, and that certainly, to my mind, if they were within a couple of points, I don't consider that a significant variation." Tr. 24. Nor did Graebner find a significant difference between Joyce and Johnson in terms of their experience. Tr. 74-75; *see also infra*, pp. 38-39.

final decision on promotions in the Agency on "probably half a dozen" occasions. Tr. 53.

C. The Affirmative Action Plans

Two Affirmative Action Plans apply to this case. One plan, the Affirmative Action Plan of the County of Santa Clara, [hereinafter referred to as the County-wide Plan] was intended to apply to all agencies of County government. A second plan [hereinafter referred to as the Agency Plan] was tailored to meet the needs of the Transportation Agency of the County of Santa Clara.

The County-wide Plan contained a long-range employment goal "to attain" a work force comprised of women, minorities and disabled persons in approximate proportion to the composition of the local labor market. J.A. 120. The County-wide Plan called for each County Agency to set short-term goals. J.A. 122. "The 'goals' established for each County Department/Agency should not be construed as 'quotas' that must be met. The 'goals' should rather be seen as realistic desired levels of achievement correcting imbalances in a Department/Agency work force." J.A. 123. In addition, the County-wide Plan directed the adoption of programs to "remove unnecessary barriers" that have prevented the County from attaining a work force reflecting the composition of the labor market in Santa Clara County. J.A. 112.

Pursuant to the mandate of the County-wide Plan and also to meet requirements imposed by the federal Urban

Mass Transportation Administration (J.A. 39),[4] the Agency Plan was adopted in December, 1978. J.A. 36.

Like the County-wide Plan, the Agency Plan established a policy to provide equal employment opportunity (J.A. 36), and set long-term goals "to attain" an Agency work force whose composition approximated that of the local labor force. J.A. 54. The Agency Plan provided for improved recruitment (J.A. 65), training programs (J.A. 77), and for special attention in filling positions where women or minorities were underrepresented as compared to their numbers in the local labor market:

> Attainment of the Agency's employment goals in all EEOC job categories and major job classifications will necessitate that the Agency Personnel Office and Division Directors give *special consideration* to affirmative action requirements in *every individual hiring action* pertaining to positions *where minorities, women and handicapped persons continue to be underrepresented.* This must be done so that no opportunity will be lost to assure that persons from these groups are provided the maximum possible opportunity for employment or career progression whenever such positions are filled either from outside the Agency or *by promotion from within.*

J.A. 60 (emphasis added).

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[4]Urban Mass Transportation Administration Equal Employment Opportunity Policies, Requirements for Grant Recipients, Circular 1155.1, Dec. 30, 1977, required each recipient of Federal grant funds to conduct work force analyses by race and sex for each job category compared to the labor market, and to provide for an affirmative action program for correcting any underutilization of affected groups. Employment goals were required for all job categories. Failure to carry out the program could result in termination of funding. *See also* 28 C.F.R. § 42.409 (1977).

The Agency Plan set no quotas, fixed timetables, or automatic preferences. It called for "realistic yearly employment goals" and provided for periodic review of the Agency's progress in meeting those goals. The goals were to be based upon the best available data as to the composition of the area labor force qualified for the positions. J.A. 64. For example, the Agency's 1982 plan, which was in effect at the time this case was tried, set a goal of hiring 3 women [about 6%] out of 55 anticipated new skilled craft positions. J.A. 143.

D. The Basis for Taking Affirmative Action

The Director of the Agency, James Graebner, as well as other managers from the Agency, testified at trial to a number of patterns, pratices and past occurrences which underscored their view that affirmative action was warranted.

The work force statistics set forth in the Agency Plan revealed a pattern that "[w]omen are the most underrepresented group in the agency" (J.A. 53), when compared with the local area labor force of 36.4% women. None of 238 of the Agency's skilled craft workers (J.A. 52) and only one of 110 road workers was a woman. J.A. 52. In the Roads Division, no women were employed in nonclerical positions except for Joyce. Tr. 220-221; J.A. 52. The Agency's entire work force was comprised of approximately 22% women, most of whom occupied clerical or bus driver positions. J.A. 49. The Agency Plan acknowledged that women had been discouraged from employment in certain jobs "because of the limited opportunities that have existed in the past for them to work

in such classifications" (J.A. 57) and because of unspecified "past practices." J.A. 31; Tr. 66.

Myra Beals, the former Assistant Personnel Officer for the Agency, testified about a number of Agency practices which she believed discriminated against women. For example, she said that the Agency had refused to hire pregnant women. Beals stated that supervisory employees had expressed the view that it "wasn't appropriate to hire women, but particularly not pregnant women. She won't even be able to fit through the door of a bus." Tr. 256.

Beals testified that women were "prevented from getting the training that was given to men in the identical position," and that this had an adverse effect on a woman's eligibility for promotion. Tr. 231. She noted that supervisors and co-workers in the Roads Division had stated that they would assign work based on feelings about "what was appropriate for women to do and what was not appropriate." Tr. 253.

As further evidence of past practice in the Roads Division, the job announcement for a Road Dispatcher vacancy in 1974 referred to the person occupying the position as "*he*" and described those performing road maintenance work in the Roads Division as "*men*." J.A. 20. When Joyce first transferred to the Roads Division in 1972 to work as a road yard clerk, both of her supervisors commented that "we wanted a *man*" for the job. Tr. 110-111 (emphasis added); *see also* Tr. 97.

Beals also testified about an incident in which Joyce had been harassed by a male co-worker in the Roads Division. He had been verbally abusive toward Joyce and had threatened to run her off the property with a forklift.

According to Beals, Joyce's supervisor resisted taking action. Tr. 254.

Agency Director Graebner testified that he knew of a number of charges regarding sex discrimination, both charges against individual employees and against the Agency as a whole. Although he was unaware of specific complaints regarding sex discrimination prior to his employment with the Agency in June 1978[5] (Tr. 42-44), he further testified that he was aware of Agency practices which persons both in and out of the Agency perceived as detrimental to equal employment opportunities for women. Tr. 65-66.[6] And, Graebner acknowledged in his 1978 preface to the Agency Plan that, "Agency employees . . . may have been subjected to discriminatory personnel practices in the past." J.A. 35.

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[5]One of these complaints pending at the time Graebner testified was a class action alleging discrimination against women in Agency service and maintenance positions. *Pacheco, et al. v. Santa Clara County Transit District, County of Santa Clara, et al.*, No. C 81-2950 RPA (N.D. Cal.1986). The individual case of one of the named plaintiffs resulted in a judgment in her favor on a hiring claim relating to the position of Utility Worker. The remainder of the class action was settled by consent decree. The decree provided, *inter alia:* hiring goals of 30% for women in new hires for the bus operator and service worker positions; damage awards of up to $35,000 for each of 14 plaintiffs; and a damage fund to be apportioned among certain class members. Copies of the Judgment of the District Court, dated January 29, 1986, and the Consent Decree, approved April 4, 1986, have been lodged with the Court.

[6]The petitioner has misrepresented the record by stating as fact that Graebner "was not aware of any past or present practices or policies which discriminated against women." Pet. Br. 7, *citing* TR. 39:10-16. While not conceding any "continued specific policy that's been detrimental" (Tr. 65), the Director acknowledged charges of sex discrimination in skilled craft jobs in the Roads Division. Tr. 42-44.

E. Decisions Below

The District Court found that "based on the examination results and the departmental interview," Johnson was more qualified than Joyce and that the "gender of Joyce was *the determining factor* in her selection," (Pet. 4a) (emphasis in original). The District Court rejected the Agency's defense that consideration of gender was a permissible affirmative action. The District Court ruled that the Agency had the burden of proving that its affirmative action plan was a *temporary* measure within the meaning of *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). (Pet. 8a, 14a) and that the Agency had failed to sustain that burden. The District Court commented that the Agency had also failed to meet its burden of proving sufficient "historical justification" for its affirmative action plan, but the court expressly declined to base its ruling on that ground. Pet. 9a.

The District Court ordered Johnson promoted to the position of Road Dispatcher, awarded back pay, differential pay until he actually received the promotion, and attorneys fees. J.A. 147, 148. The District Court order has been fully satisfied.[7]

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[7]Johnson was promoted to the position of Road Dispatcher, from which he retired during 1985. The Petitioner seriously errs in stating that Johnson did not receive full pay as ordered by the Court. Pet. Br. 10, n.17. His pay was adjusted effective December 19, 1982. This raises the issue of whether Johnson still retains a concrete interest in the outcome of this litigation, or whether subsequent events have rendered this case moot. Since

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On appeal, the Court of Appeals for the Ninth Circuit reversed. The panel majority held that the District Court erred by ruling that the Agency's plan was not temporary. *Johnson v. Transportation Agency, Santa Clara County, California*, 770 F.2d 752, 756-57 (9th Cir. 1985). The majority, also relying on *Weber*, held that evidence of a "conspicuous imbalance in [the employer's] work force" was sufficient to establish the need for the Agency's remedial affirmative action plan. Pet. 13a, 26a; 770 F.2d at 758 & n.4. The Ninth Circuit concluded that the Agency plan would neither bar men from promotional opportunities nor unnecessarily infringe their rights. Pet. 27a-29a, 770 F.2d at 759.

SUMMARY OF ARGUMENT

Where an employer has a firm factual basis for concluding that discrimination may have occurred in its own employment setting, it should be permitted under Title VII to take voluntary race or gender conscious remedial measures. In this case, the factual predicate for taking gender conscious action was twofold. First, the Agency was

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Johnson has retired, his only possible remaining interest in this case pertains to whether the County can obtain reimbursement of the attorneys fees and damage amount it has already paid Johnson. But for this issue, the case would be moot. Compare *De Funis v. Odegaard*, 416 U.S. 312 (1974) where a law student's race discrimination claim was rendered moot because he had nearly graduated by the time his case came before this Court.

aware of a statistical pattern which showed that in several Agency jobs women were severely underrepresented as compared with the local labor market. Second, the Agency was aware of its own restrictive employment practices which may have contributed to this underrepresentation of women. Given this evidence, which was unrebutted at trial and which the Court of Appeals found to constitute a *prima facie* case of discrimination against women, the Agency had an ample basis upon which to voluntarily adopt a modest affirmative action plan. It should not have been necessary, under these circumstances, for the Agency to prove its own wrongdoing in order to redress discrimination which it reasonably believed may have occurred.

The affirmative action plan here was appropriately tailored to meet its remedial purpose. There were no quotas or rigid preferences. The Agency's flexible approach, permitting gender to be considered as one factor in decisions affecting only those jobs where women were underrepresented, was well designed to meet the remedial need perceived by the Agency. The Plan did not foreclose anyone's opportunity for employment. As applied to this case, the Plan's remedial purpose was met without placing an undue burden on the Petitioner. A promotion was postponed, but the Petitioner did not lose his job or the opportunity to compete for other positions.

The Petitioner did not meet his burden of proving either that the Agency's action served no remedial purpose, or that it placed a disproportionate burden on him. Therefore, the Petitioner should not prevail.

ARGUMENT

I. THE AGENCY'S CONSIDERATION OF GENDER IN PROMOTING A QUALIFIED WOMAN PURSUANT TO ITS AFFIRMATIVE ACTION PLAN DID NOT VIOLATE PETITIONER'S TITLE VII RIGHTS

A. An Employer May Take Voluntary Gender or Race Conscious Remedial Action if it Has a Firm Basis to Believe That Such Action is Needed To Remedy the Effects of Apparent Prior Discrimination.

The prohibitions against discrimination found in Sections 703 and 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(j) and 2000e-5(g) do not preclude employers from voluntarily using appropriate race or gender conscious practices as a means of carrying out the remedial purposes of Title VII. *United Steelworkers of America v. Weber*, 443 U.S. 193, 204-06, 205 n.5 (1979); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977); *Local Number 93, International Association of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3072, 3073 (1986).

Beginning with *Weber*, this Court has consistently recognized that Congress intended voluntary action to be the preferred course of achieving the remedial purposes of Title VII. *Weber*, 443 U.S. at 204-207; *Firefighters*, 106 S. Ct. 3072, 3073; *see also Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 106 S. Ct. 3019, 3035-36, 3042-44 (1986).

Title VII does not restrict voluntary affirmative action to employers who admit or are found to have violated the law. *Weber*, 443 U.S. at 207-8 & n.7. Rather, there is an

"area of discretion left by Title VII" to employers voluntarily "to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id.* at 209.

This Court in *Weber* did not delineate the showing required by an employer to justify affirmative action designed to eliminate race or sex underrepresentation. *Id.* at 208. The Court upheld the need for affirmative action in *Weber* based primarily upon statistical evidence that the employer's skilled craft workforce was comprised of only 1.83% black employees compared to a figure of 39% in the local labor market. *Id.* at 198-99.

Late last Term, the Court posed, but did not decide, the question of "what showing the employer would be required to make concerning possible prior discrimination on its part against minorities [or women] in order to defeat a challenge [to affirmative action measures] by non-minority employees based on § 703." *Firefighters*, 106 S. Ct. 3063, 3073 n.8; *see also id.*, at 3080 (O'Connor, J., concurring). Also last Term, the Court considered the related question of what showing is required to justify affirmative action by a public employer subject to the Fourteenth Amendment. In *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986), the plurality "insisted upon some showing of discrimination by the governmental unit." *Id.* at 1847-48.

Although the *Weber*, *Wygant*, *Firefighters* and *Sheet Metal Workers* decisions do not fully describe the range of possible evidentiary showings that would justify race or gender conscious remedial action, these decisions sug-

gest a set of parameters against which to measure affirmative action plans. Throughout these decisions,[8] and at the heart of the question in this case, is the Court's recognition that an employer need not admit or be proven to have actually discriminated against others in order to justify affirmative remedial action.

The *Wygant* case provides helpful guidance, even though it was decided in the context of the Fourteenth Amendment.[9] The plurality opinion states that in order to take race or gender conscious action, a public employer must have "convincing evidence that remedial action is warranted, [t]hat is, . . . sufficient evidence to justify the conclusion that there has been prior discrimination." *Wygant*, 106 S. Ct. at 1848. Justice O'Connor's concurrence noted the Court's apparent agreement that, "[t]his remedial purpose need not be accompanied by contemporaneous findings of actual discrimination . . . as long as the public actor has a firm basis for believing that re-

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[8]In *Weber*, the Court's emphasis was not on the employer's own past practices or their effects, but, rather, on the existence of "conspicuous racial imbalances in traditionally segregated job categories." 433 U.S. at 209. Justice Blackmun's concurring opinion in *Weber* proposed a standard that affirmative action must be a response to an employer's "arguable violation," with an understanding that "in practice the emphasis would be on 'arguable' rather than on 'violation'." 443 U.S. at 211, 213 (Blackmun, J., concurring). In *Wygant*, the insistence upon "some showing of discrimination by the governmental unit" (*Wygant* 106 S. Ct. at 1847-48) is similar to the "arguable violation" approach.

[9]The Fourteenth Amendment was not raised in this case. Even if the Fourteenth Amendment had been raised below, the Agency's affirmative action here is consistent with the Fourteenth Amendment as interpreted in *Wygant*, 106 S. Ct. at 1848-49, as well as Title VII as interpreted in *Weber*, 443 U.S. at 208 See discussion *infra*, pp. 44-47.

medial action is required." *Id.* at 1853 (O'Connor, J., concurring. Justice O'Connor further commented that,

> The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. [citation omitted] This result would clearly be at odds with this Court's and Congress' consistent emphasis on "the value of voluntary efforts to further the objectives of the law."

Wygant, 106 S. Ct. at 1855 (O'Connor, J., concurring), *citing Regents of the University of California v. Bakke,* 438 U.S. 265, 364 (1978).

The dilemma facing an employer, aptly characterized as being on "a high tightrope without a net beneath" (*Weber,* 443 U.S. at 210, (Blackmun, J., concurring), was recognized once again in *Wygant:* "[E]mployers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to non-minorities if affirmative action *is* taken." *Wygant,* 106 S. Ct. at 1855 (O'Connor, J., concurring) (emphasis in original).

Rather than requiring proof of actual discriminatory conduct, the *Wygant* plurality opinion requires the evidentiary showing to be sufficiently firm to support the *employer's* conclusion that remedial action is warranted. *Wygant,* 106 S. Ct. at 1848. Even when their actions are subject to the Court's strict scrutiny, public employers may take race conscious remedial action "on the basis of information which gives them a sufficient basis for

concluding that remedial action is necessary." *Wygant,* at 106 S. Ct. at 1855-56 (O'Connor, J., concurring).

By way of illustration, Justice O'Connor has suggested that statistical disparities, such as those present in *Weber* (and present in this case) would provide a firm foundation for affirmative action:

> Public employers are not without reliable benchmarks in making this determination. For example, demontrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

Wygant, 106 S. Ct. at 1856 (O'Connor, J., concurring).

To require an employer to produce more than substantial evidence from which it can be inferred that the employer may have discriminated would defeat several important policies underlying Title VII. The first such policy is that Title VII should prompt employers "to self-examine and to self-evaluate their employment practices." *Albemarle Paper Company v. Moody,* 422 U.S. 405, 418 (1975) (*cited with approval in Weber,* 443 U.S. at 204). The second and related policy is that Title VII's mandate to eliminate the effects of past discrimination should be principally achieved through voluntary compliance. *Alex-*

ander v. Gardner-Denver Company, 415 U.S. 36, 44 (1974); *Firefighters,* 106 S. Ct. 3063, 3072 (1986). A rule which requires employers to admit past unlawful acts, or which prohibits affirmative action in the absence of evidence that proves that an employer actually discriminated, would be tantamount to requiring employers to prove their own wrongdoing. Such a rule would effectively deter employers from self-examination and voluntary remedial action. *See, e.g., Wygant,* 106 S. Ct. at 1855 (O'Connor, J., concurring); *Weber,* 443 U.S. at 211 (Blackmun, J., concurring).

No majority of this Court has ever required an admission or finding of past discrimination by the employer to justify its voluntary affirmative action. A majority of the Court has, in separate opinions, wisely declined to impose such a burden on employers. *Wygant,* 106 S. Ct. at 1849 n.5; *id.* at 1855-56 (O'Connor, J., concurring). The Court should now hold that when an employer has a firm basis for concluding that past discrimination may have occurred—such as awareness of evidence that would constitute a *prima facie* showing of a Title VII violation —it may adopt appropriate race or gender conscious remedial measures.

B. The Agency Had a Firm Factual Basis for Concluding That Remedial Action Was Appropriate.

In this case, the Agency produced substantial evidence, both in the form of statistics and testimony concerning Agency practices, which supported the Agency's determination to take remedial action.

1. Statistical Evidence of a Conspicuous Gender Underrepresentation in the Agency's Road and Skilled Craft Positions Provided a Firm Basis for Believing that Remedial Action was Warranted.

Among the several factors the Agency Director considered in selecting a new road dispatcher, none was more important than the virtually complete exclusion of women from employment in skilled craft and road positions. Out of 238 skilled craft employees of the Agency, none were women. The Agency had never employed a woman road dispatcher. In the Roads Division, only one out of 110 road maintenance workers was a woman. J.A. 52. The lack of women in these jobs was especially troubling in light of the fact that women comprised more than 36% of the local area labor force and 22% of the Agency's work force as a whole. J.A. 49.

Based upon statistical disparities such as these, this Court has upheld inferences of prior discrimination by employers. As this Court first stated in *Teamsters*,[10] later reaffirmed in *Hazelwood*,[11] and most recently relied upon in *Wygant*,

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[10] *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337 n.17 (1977) (a *prima facie* case was found in statistics which showed no minority line drivers compared to a 10-22% minority population in the surrounding communities and a 18-51% population in the cities proper).

[11] *Hazelwood School District v. United States*, 433 U.S. 299 (1977) (a *prima facie* case of discrimination was established by statistics that the school district teaching staff was comprised of 1.4% to 1.8% black teachers, in contrast to either 5.7% or 15.4% black area teaching force); *id.* at 308-09 & n.14; *see also id.* at 313-14 (Brennan, J., concurring).

> Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Teamsters, 431 U.S. at 340 n.20; *see also Hazelwood,* 433 U.S. at 307.

Statistical comparisons between an employer's workforce and the area labor market provide a reliable benchmark from which prior discrimination may be inferred. *Wygant,* 106 S. Ct. at 1856 (O'Connor, J., concurring); *Bazemore v. Friday,* 106 S. Ct. 3000, 3008 (1986); *Teamsters,* 431 U.S. 324, 340 n.20; *Hazelwood,* 433 U.S. 299, 307.[12] Even though Title VII imposes no requirement that an employer's workforce mirror the general population, (*Teamsters,* 431 U.S. 324, 340 n.20), where disparities are great, "they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood,* 433 U.S. at 307-08; *see also Teamsters,* 431 U.S. at 339.

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[12]Indeed, even comparisons with general population statistics may be probative. *Cf. Local 28 of the Sheet Metal Workers' International Association v. EEOC,* 106 S. Ct. 3019 (1986) ("there must be a substantial statistical disparity between the composition of an employer's workforce and the relevant labor pool, *or the general population,* before an intent to discriminate may be inferred from such a disparity.") *Id.* at 3060 (O'Connor, J., concurring in part and dissenting in part) (emphasis added). Here, the Agency compared its workforce to area labor statistics which are more probative than general population statistics. The Agency also compared its own job category statistics to its workforce as a whole.

In this case, the absence of women in certain Agency positions is comparable to "the inexorable zero" which this Court has identified as a telltale sign of discrimination. *Teamsters,* 431 U.S. 324, 342 n.23. Given the statistical indicia of past exclusion, the Agency was amply justified in its belief that remedial action was needed.

At trial, the Petitioner made no attempt to rebut the Agency's statistics. Now the Petitioner seeks to rebut the inference of discrimination derived from the statistics by suggesting that women lacked interest in skilled craft jobs. Pet. Br. 7, n.12; 29. In making this suggestion, Petitioner has misinterpreted that portion of the record upon which he relies,[13] and placed "substantial weight" (Pet. Br. 29, n.29) on testimony which the District Court expressly disregarded.[14] The Petitioner would have this Court conclude that the number of women qualified and interested in road work or skilled craft jobs was so low that it would be reasonable to expect to find *no* women employees out of 238 skilled craft workers and only one woman nonclerical employee in the Roads Division. This argument is groundless since there was no evidence that the percentage of women in the labor market was anything approaching

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[13]The witness testified that she thought the goal of 36.4% women was not realistic for some job categories perhaps because women lacked interest or "just by tradition had never trained for some of the jobs." Tr. 263. The Agency Plan acknowledged that lower goals were more realistic for some jobs (J.A. 58); and, for example, set a short term goal of 3 women out of 55 new hires in skilled craft jobs. J.A. 143.

[14]The District Court judge commented "We've been sitting here for three quarters of an hour with this witness, and I haven't gathered anything of probative value from her at all." Tr. 281.

zero.[15] It would be a rare job indeed for which absolutely no women qualify or show interest. *Cf. Dothard v. Rawlinson,* 433 U.S. 321 (1977) (employer's bona fide occupational qualification defense, § 703(e) of Title VII, sustained because female correctional counselors would pose substantial security problem in maximum security male penitentiaries).

The Agency reasonably assumed from the conspicuous lack of women in its own workforce, that the imbalance was not solely attributable to factors outside the Agency's control. The statistics are traceable at least in part to the Agency's own action. The *Agency* made each of the 238 skilled craft hiring decisions, none of which resulted in the hiring of a woman. The *Agency* was responsible for hiring no women for 110 road maintenance positions before it hired Joyce.

The extent to which the absence of women from craft jobs may have also reflected lack of qualified female applicants was never proven at trial. It was never shown, as the Petitioner framed the question, that the statistics were "unrelated to discrimination." Pet. Br. i. Rather, evidence of Agency practices presented at trial supports an inference that the complete absence of women may have been caused by discrimination, not merely by "inherent" female traits or preferences. In light of these statistical facts, and inferences which can be drawn from them, the

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[15]On the contrary, the Agency Director testified that "quite a number of females" are capable of handling even those jobs involving heavy lifting. Tr. 65. The Agency Plan stated that "there is an increasing percentage of women in the area who desire to work in nontraditional positions." J.A. 66.

Agency correctly looked first to its own work force patterns to assess the need for remedial action.[16]

2. The Statistics Were Buttressed by Evidence of Agency Practices Which May Have Discriminated Against Women.

In addition to the statistical disparity between the Agency's workforce and the local area labor pool, other evidence was presented to support the Agency's conclusion that remedial action was necessary. Agency personnel had refused to hire pregnant women, excluded women from training opportunities, and made work assignments based on feelings about what work was appropriate for women and what work was not appropriate.[17] *See supra,* pp. 8-9. None of these practices were rebutted by the Petitioner.

The Agency, and not "society," was directly responsible for these restrictive hiring and assignment practices. These practices provided a strong basis upon which the Agency could conclude that *its own actions* contributed to

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[16]The Government's attempt to minimize the weight of the Agency's statistical proof, absent extensive applicant flow data analysis, is unwarranted. U.S. Brief 24. As this Court has held, such "fine tuning of the statistics" cannot obscure "the glaring absence" of female employees, which gives rise to the inference of discriminatory intent. This inference derives "not from a misuse of statistics, but from the 'inexorable zero.' " *Teamsters v. U.S.*, 431 U.S. 324, 342 n.23 (1977).

[17]Restrictive hiring practices such as the refusal to hire pregnant women, are by themselves *prima facie* violations of Title VII. Section 701(k), 42 U.S.C. § 2000e(k). Gender-based assignment decisions were also *prima facie* violations of Title VII. *See* B. Schlei & P. Grossman, *Employment Discrimination Law* (2d ed. 1983), pp. 340-349. Such practices may have had an effect of discouraging women from even applying for jobs in the Agency.

the gross statistical imbalance.[18] Joyce's own experiences provided further evidentiary support for an inference that women may have been discriminated against in the Roads Division. (*See supra,* pp. 2-3, 8).[19]

In addition to the Agency practices specifically described at trial, both the Agency Plan and Director Graebner's testimony refer to "past practices" and other pending complaints of sex discrimination which had been brought against the Agency.[20] J.A. 35; Tr. 42-44, 65-66. These patterns and practices of the Agency provided a firm basis for its conclusion that it may have discriminated against women in its own employment practices and that voluntary remedial action should be taken. The Ninth Cir-

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[18]For example, the Agency's own 1974 announcement for the Road Dispatcher position referring only to "he" and "men" could obviously have the effect of discouraging women from applying for the position. Section 704(b), 42 U.S.C. § 2000e-3(b) prohibits job advertising which shows a preference for a particular sex. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.5 states "It is a violation of Title VII for a help wanted advertisement to indicate a preference . . . based on sex . . .".

[19]The District Court agreed that an inference of "discriminatory intent" may be drawn from the incident involving denial of protective clothing, but concluded that this incident *by itself* did not justify an affirmative action plan. Pet. 9a. These incidents, however, should not be considered in isolation. The inference of discrimination is strengthened when these incidents are considered in concert with the stark statistical imbalances.

[20]Indeed, one of the complaints led to a District Court trial which resulted in a judgment that the *Agency's own hiring practices* had discriminated against women. *Pacheco, et al. v. Santa Clara County Transit District, County of Santa Clara, et al.,* No. C 81-2950 RPA (Judgment of the District Court, Jan. 29, 1986). *See supra,* p. 9 n.5. Although the outcome of this case was not known at the time of the decision to promote Joyce, it shows that, in retrospect, the Agency was more than vulnerable to a suit alleging discrimination against women.

cuit correctly found that "the statistics would make a *prima facie* case of discrimination" (Pet. 50a), and that "a plethora of proof" was not needed to support the Agency's attempt to remedy the pattern of underrepresentation.[21] Pet. 26a-27a. Nevertheless, the record also contained evidence of a variety of practices which both confirm and explain the inferences that could have been drawn from the statistics.

C. The Agency's Action was Appropriately Designed to Accomplish its Remedial Purpose Without Unnecessarily Limiting Opportunities for Others

This Court's major affirmative action decisions, whether based upon Title VII or the Equal Protection Clause, consistently state that the means chosen to provide an effective remedy for apparent prior discrimination must be limited in their scope and effect on others.[22]

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[21]This court need not decide whether given this evidence, the District Court finding of no discrimination against women was clearly erroneous. Nor must this Court decide whether the evidence supported the contrary Court of Appeals finding of a *prima facie* case of discrimination. Review of these conflicting legal conclusions reached by the courts below would miss the pivotal issue here, i.e., whether there was sufficient evidence to support the *Agency's* conclusion that it may have discriminated against women in the past and that affirmative remedial action was warranted. Indeed, here as in *Weber*, a lower court finding that the employer had not discriminated, *Weber* at 225, n.6 (Rehnquist, J., dissenting), was not dispositive.

[22]*See e.g., Weber*, 443 U.S. at 208 (Four factors made the plan permissible: (1) it did not "unnecessarily trammel the interests of the white employees;" (2) it did not "create an absolute bar to advancement of white employees;" (3) it was "a temporary measure;" and (4) it was designed "to eliminate a manifest racial imbalance" rather than "to maintain racial balance."); *Wygant*, 106 S. Ct. at 1850 (Powell, J., plurality opinion)

(Continued on next page)

Having concluded that some remedial action was necessary, the Agency adopted a modest affirmative action plan which was "within the area of discretion left by Title VII" for voluntary race or gender conscious relief. *Weber*, 443 U.S. at 209. The principal features of the Agency's Plan, and the context in which it was applied in this case, show that the Agency chose appropriate means to remedy a pattern of underrepresentation. Many elements of the Agency's Plan mirror the plan approved in *Weber*.[23] Like

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(under strict scrutiny, "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose"); *Id.* at 1852 (O'Connor, J., concurring) (adopting the same "narrowly tailored" standard); *Sheet Metal Workers*, 106 S. Ct. at 3051-52; (affirmative action goal was necessary to end discrimination; flexible application of the goal shows that its purpose was not to maintain racial balance; goal does not "unnecessarily trammel the interests of white employees"); *Id.* at 3061 (goals should be carefully tailored to remedy the violation, should be temporary remedial measures rather than efforts to maintain racial balance, should not unnecessarily trammel the interests of the majority and should avoid adverse impact on a "small, ascertainable group of nonminority persons") (O'Connor, J., concurring in part and dissenting in part); *Id.* at 3055 ("four factors" including "efficacy of alternative remedies," "duration of the remedy," appropriateness of numerical goal, and flexibility of plan) (Powell, J., concurring in part and concurring in the judgment) (*citing Fullilove v. Klutznick*, 448 U.S. 510-11 (1980) (Powell, J., concurring)).

[23]Under the *Kaiser* affirmative action plan, trainees for the promotion training program were selected on the basis of seniority provided that at least 50% of the trainees were to be black until the percentage of black skilled craftworkers in the plant approximated the percentage of blacks in the local labor force. *Weber*, 443 U.S. at 199. The plan did not unnecessarily trammel the interests of white employees, in part because it did not require the discharge of white employees and their replacement with new black hirees. The plan did not create an absolute bar to the advancement of white employees because half of those trained in the program would be white. The plan was temporary and not intended to maintain racial balance, but was to stop as soon as the percentage of skilled craftworkers approximated the percentage of blacks in the local labor force. *Id.* at 208-09.

the Kaiser plan, the Agency's Plan was remedial of a conspicuous imbalance; it did not unduly limit the rights of the majority; and it was to last only until the employer's work force composition approximated that of the labor market. One feature of the Agency Plan underscores its limited nature: it contained *no quotas or fixed preferences.* Rather, the Plan reserved to the Agency administration the discretion to select appropriate and effective remedies on a case-by-case basis.

1. The Agency's Plan Allowed it to Make Flexible Use of Tailored Remedies Without Imposing Fixed Numerical Preferences.

The Agency's Plan "recognized that mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of any equitable representation of minorities [and] women." J.A. 65. Accordingly, the Plan called for the Agency to scrutinize and, where appropriate, to modify the full spectrum of the Agency's employment practices. The Agency Plan applied to recruitment, testing, hiring, promotion, training, use of independent contractors, and employee evaluation procedures, all of which were to be considered pursuant to the remedial purposes of the Plan. J.A. 62-93.[24] Those provisions of the Plan are not the type of

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[24]The Plan (J.A. 133) specifically required that,

a. Employment by the Agency is kept freely open to all persons regardless of race, color, national origin, religion, sex, age or handicapped status.

b. Any possible barriers to employment and promotion of minorities, women and handicapped persons are removed.

c. Aggressive and imaginative continuing efforts are made to attract and assist minorities, women and handicapped persons to qualify for employment and promotion as needed to attain an equitable representation in all occupational fields and at all job levels.

measures that the Court has referred to as "affirmative action"; rather, they simply require no discrimination in the Agency's employment practi[illegible]

The Agency Plan's most [illegible]e affirmative action measure required that "special consideration" be given to protected group members in those job categories for which their group was underrepresented. J.A. 60. The Plan imposed no quota, fixed percentage, or numerical preference for any job. Nor was the "special consideration" provision a euphemism for any conclusive race or gender conscious preference. Rather, when applicable, consideration of race or gender was merely one factor to be weighed along with all other factors in reaching appropriate decisions.[25] Such other factors included experience, interview or test results, and other traditional measures of qualifications.

The Plan's flexible case-by-case approach, which treated gender imbalance as merely one factor in the decision-making process, stands in marked contrast to the more rigid preferences reviewed by the Court in *Weber, Bakke, Fullilove, Sheet Metal Workers' and Firefighters.*[26] The

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[25]Director Graebner testified that his special consideration of Joyce's sex was only one factor, whose weight could not be qualified, in the selection decision. Tr. 58-59.

[26]*Weber,* 443 U.S. 193, 198-99 (1979) (plan required 50% black admission to skilled crafts promotion training program); *Regents of the University of California v. Bakke,* 438 U.S. 265, 275 (1978) (16 out of 100 spaces to medical school reserved for minorities); *Fullilove v. Klutznick,* 448 U.S. 448, 453-54 (1980) (minority business enterprise provision of the Public Works Employment Act of 1977 required that at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to contract with businesses owned by minority group members); *Sheet Metal Workers,* 106 S. Ct. at 3027 (29% nonwhite membership goal to be met by union); *Firefighters v. Cleveland,* 106 S. Ct. at 3069 (specified numbers of minority group to be promoted within shortened period).

Agency's approach excluded no qualified individual from consideration for any position. Unlike cases involving fixed ratios of new hires or trainees, the instant plan allowed every person an opportunity to compete for every position.

In contrast to cases involving dual hiring lists,[27] under the Agency's Plan, for *every* job, every applicant's qualifications had to be weighed against those of all other applicants. Any applicant among the top seven persons on the list of eligibles could be selected. The Agency's Plan thus operated within the Agency's existing merit system rules, rather than as an exception to them.

This flexible and discretionary case-by-case approach, with statistical race or gender underrepresentation being only one of several factors considered in employment decisions, is very similar to the approach preferred by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Under the Harvard admissions policy there discussed, the ethnic background of a person was one factor among many to be considered in deciding on admission to school. The Agency's Plan, like the Harvard policy, set no rigid quotas, permitted consideration of the individual merit of each applicant, and foreclosed consideration for no one on the basis of race or gender. *Id.* at 316-24.

In cases where rigid numerical goals are not necessary to remedy past discrimination, flexibility and discretion

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[27] *Compare Local 93, International Association of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3069 (1986) (Appointments for minorities were made from a second civil service list. This could result in the promotion of persons who may not have been eligible for promotion, but for race-conscious relief).

are the preferred prescription for affirmative action plans. *See, e.g., Sheet Metal Workers,'* 106 S. Ct. at 3050; *Id.* at 3056-57 (Powell, J., concurring); *Id.* at 3059 (O'Connor, J., concurring in part and dissenting in part). The Agency Plan meets that prescription.

2. The Agency's Plan Was a Temporary Measure Designed to Correct an Existing Underrepresentation Rather Than to Maintain any Particular Balance.

The Plans' purpose was to *attain* an Agency workforce free of the gross underrepresentation of women which can be a telltale sign of past discrimination. No evidence was presented that the Plan was either designed or used to maintain any fixed percentages of women in the workforce, or that the Plan's "special consideration" feature would continue once the remedial goals had been attained.

The record contains substantial evidence supporting the Court of Appeals' conclusion that the Agency Plan's "special consideration" aspect was temporary, not permanent. Pet. App. 23a-25a; *Johnson,* 770 F.2d at 757. The County-wide and Agency Plan documents themselves specify no fewer than ten times that their purpose was "to attain" specified workforce percentages. *E.g.,* J.A. 31, 34, 54, 55, 58, 112, 120, 133, 135. *Not once* do the plans state or suggest a purpose to *maintain* a balanced workforce.

Graebner's testimony, on which the District Court hinged its findings of permanence, actually supports the view that the Plan's affirmative provisions were temporary. Graebner distinguished between the Plan's "broader goal" of equal opportunity, to which the Agency had made a permanent commitment, and those particular af-

firmative measures which were to be used as necessary to correct female underrepresentation.[28] The Agency's specific goal is repeatedly stated to be "measurable yearly improvement in the hiring, training, and promotion of [underrepresented groups] in the major job classifications . . . where these groups are underrepresented." J.A. 35. The specific goal of "yearly improvement" is consistent with the objective of moving from a deficit position *toward* a parity position, i.e., to correct underrepresentation. Such a statement is not consistent with *maintaining* a fixed balance. The testimony of Beals, the Agency's former Per-

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[28]Graebner testified:

"The broader goal of affirmative action is something which . . . is a permanent part of the Agency's basic operating philosophy. *So the broader goal is divorced,* if you will, *from specific numbers or percentages.*

In terms of the desire to hire, to promote, *to give opportunity and training on an equitable, non-discriminatory basis* as part of our operating philosophy, *that is a permanent part.*"

Q: "*. . . And that would include white males?*"

A: "*Right*".

Tr. 49 (emphasis added).

He further testified:

Q: "So as I understand it, . . . in your mind, . . . the transportation agency's affirmative action plan is not going to end?"

A: "That's correct".

Q: "And it's going to continue to be applied in order that the composition of the agency reflects goals, some goals?"

A: "Correct".

Q: "And that pertains to race and sex?"

A: "*Pertains to equal opportunity.* And those could be two measures where an *opportunity* should be afforded."

Tr. 58-59 (emphasis added).

sonnel Officer, confirmed that responsible Agency officials understood the transitional nature of the Plan's affirmative provisions.[29]

The Agency Plan, like the plans approved in *Weber*, 443 U.S. at 208-09, and *Sheet Metal Workers'*, 106 S. Ct. at 3052, had no express ending date. In all three cases, the specific affirmative provisions were to remain in effect *until* statistical indicia of underrepresentation were eliminated. Nothing in the Agency Plan required any further percentage-linked action once the Agency attained its goal of eliminating the existing imbalances. In this respect, the Plan comports with principles established by this Court in education cases, *e.g., Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436 (1976) (permanence of the plan is relevant only if it is shown that the need for the plan no longer exists), as well as employment cases, *e.g., Wygant*, 106 S. Ct. at 1847; ("role model" justification for affirmative action invalid because, *inter alia*, it has "no logical stopping point" and would continue "long past the point required by any legitimate remedial purpose.") *Id.; Weber*, 443 U.S. at 208 (plan valid because, *inter alia*, it "is a temporary measure . . . not in-

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[29]Beals testified as follows:

"Q: Are you aware of any particular end date to any aspect of this affirmative action plan?

A: No . . .

Q: To your knowledge, it was going to go on in perpetuity?

A: My understanding is that it would go on *until the goals were achieved*. . . .

. . . *[I]n an area in which the goal had been met or exceeded, the plan had no role to play.*

Tr. 241-242 (emphasis added).

tended to maintain racial balance, but simply to eliminate a manifest racial imbalance.") *Id.*[30]

The Plan's temporary focus on "attaining" or moving toward a representative work force was complemented by the Plan's requirement of periodic adjustment of short-term goals and review of progress toward long-term goals. J.A. 87-89. The requirement that there be periodic review of the short-term goals and of the progress toward achieving the Agency's long-term goals typifies the Agency's cautious and gradual approach to redressing its apparent prior discrimination against women. Periodic review of the goals and progress toward reaching them facilitated the setting of *realistic* goals, rather than the opposite.[31]

Moreover, the simple fact that the Agency's plan called for periodic review and setting of realistic short-term employment goals served to protect it from moving beyond the narrow boundaries of permissible affirmative

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[30]The Court's concern with regard to the duration of the affirmative action plans reviewed in *Weber*, 443 U.S. at 208-09, and in *Wygant*, 106 S. Ct. at 1847, was heightened because, so long as those plans remained in effect, nonminority employees were precluded from consideration for some portion of job opportunities. In this case, there is no such group of positions or period of time during which males are removed from consideration. Although the Court's concern over the duration factor should logically be lessened in this case, the Agency's Plan nevertheless meets the temporal guidelines suggested in these earlier decisions.

[31]Periodic review such as provided in the Agency's plan was not "social engineering" or a casual effort to manipulate the composition of the Agency's work force, as has been suggested. U.S. Br. 9. No facts in the record suggest that the Agency had or would alter its long or short term hiring goals to unrealistic levels.

action. Periodic review assured that all segments of the community had an opportunity to observe the Agency's progress and to participate in the debate concerning the implementation of the affirmative action plan.[32] This review was to take place in the local forum as Congress anticipated when it enacted Title VII: "Congress was not legislating about 'preferential treatment or quotas in employment' because it believed that 'the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves.' " *Firefighters,* 106 S. Ct. 3063, 3074 (*quoting* 110 Cong. Rec. 15,893 (1964) (remarks of Rep. MacGregor)), citing *Weber,* 443 U.S. at 207-08, n.7.

3. The Agency's Action Did Not Unduly Limit Employment Opportunities for Men.

The Agency Plan did not "trammel upon" or unduly limit employment opportunities of male employees. In that respect, this case differs from the layoff cases that prompted the Court to express concern over the burden caused by the "loss of an existing job," *Wygant,* 106 S. Ct. at 1851.

In the Agency as a whole, employment opportunities were expanding during the time the Plan was devised and

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[32]In California, a public agency's actions are subject to the open meeting law. Cal. Gov't Code § 54950, *et seq.* (West 1980). Under this law, no action of the Transportation Agency Board to review or modify the affirmative action plan can be held behind closed doors. Similarly, under California law, public employees have a right to "meet and confer" on methods the Agency may pursue to change terms and conditions of employment. The employee's union representative, who has a duty to fairly represent all employees, may participate in negotiations concerning employment criteria, training programs, and affirmative action plans which affect terms and conditions of employment. Cal. Gov't Code § 3500 *et seq.* (West 1980).

implemented. Hundreds of new positions were being added. J.A. 59-60. During the years from 1978, when the Plan was first implemented, to 1982, the year when the trial took place, the skilled craft work force increased by 111 positions (from 238 to 349), but the number of females holding such jobs increased from zero to only six. J.A. 49; S.E.R. 84. Employment of men in skilled craft jobs thus increased by 105 jobs, or 42% over the 1978 level.[33] The Agency's own annual goals show that it expected and planned that most of these positions would be taken by men.[34] The 1982 yearly goals projected filling 35 skilled craft positions with 52 men and only three women. J.A. 143. The impact of the Agency's Plan on male employees was less than the effect on white employees of the promotional plan approved in *Weber*. That plan, although it reserved 50% of all positions for blacks, "[did not] create an absolute bar to the advancement of white employees [because] half of those trained in the program

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[33]Petitioner misrepresents the record in asserting that there would be no expansion of job opportunities in the Roads Division. Pet. Br. 17 ("lack of any new positions"), Pet. Br. 35 ("no new jobs in the Agency, except for the Transit Division"). The record actually stated that "the majority" or "most" of the hundreds of new positions were expected to be in bus related jobs, not all of them. J.A. 59. Some of the new jobs were in the Roads Division. In fact, another Road Dispatcher position was added in 1983.

[34]Petitioner's suggestion that the Agency Plan required the Agency to prefer women in every case is totally without evidentiary support. Pet. Br. 41 ("very unlikely" that men would be promoted [illegible]et. Br. 43 ("so long as . . . a woman applied," men would be "denied"). According to the Court of Appeals, there was no evidence of "a distinct pattern of exclusion of non-minority candidates." Pet. 29a. Moreover, the Agency is entitled to a presumption that it was applying the "gender factor" approach in good faith and not as a cover for the functional equivalent of a quota system. *See Bakke*, 438 U.S. 265, 318 (1978).

will be white." 443 U.S. at 208. *See also Sheet Metal Workers'*, 106 S. Ct. 3019 (upholding decree under which "a majority of those [hired] have been white.") *Id.* at 3052.

As a result of the promotion decision challenged in this case, Johnson lost, temporarily,[35] a future opportunity, but he was not displaced from his duties, seniority, or salary in his position as a road maintenance worker. This case is thus analogous to promotion plans upheld in *Weber* and *Sheet Metal Workers'*, and distinguishable from the lay-off preferences disapproved in *Wygant* and *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (city could not abridge collectively bargained last-hired, first-fired seniority system despite consent decree). The Agency's Plan, like the decree upheld in *Sheet Metal Workers'*, "will have only a marginal impact on the interests of [male] workers," *Sheet Metal Workers'*, 106 S. Ct. at 3053.

What differentiates the instant case from all of this Court's previous affirmative action decisions is the focus here on one particular competition for one job promotion. Although the Plan as a whole imposes little or no burden on males as a class, Joyce's selection had more than a "marginal" effect from Petitioner's perspective. However, the impact on Petitioner must be weighed in light of the necessary corollary to affirmative action: "[a]s part of this Nation's dedication to eradicating racial [and gender] discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant*, 106 S.

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[35]The impact upon Johnson was short-lived because a new road dispatcher position was created in 1983, with the result that both Johnson and Joyce held road dispatcher jobs simultaneously. Thus, the practical effect of Joyce's promotion was merely to postpone Johnson's promotion.

Ct. at 1850. For over a decade, since *Franks v. Bowman Transportation Company*, 424 U.S. 747, 777-78 (1976), this Court has recognized that "such 'a sharing of the burden' by innocent parties is not impermissible," *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980) *quoted in Wygant*, 106 S. Ct. at 1850, even though such parties' good-faith expectations are compromised. In *Weber*, 443 U.S. at 208-09, and more recently in *Sheet Metal Workers'*, 106 S. Ct. at 3050-53, this Court approved voluntary adoption of remedial programs which impose such "burden-sharing" on third parties.

The fact that a single identifiable individual may in a particular case "be called upon to bear some of the burden of the remedy," is insufficient reason to invalidate the employer's affirmative action. It is impossible to diffuse the impact of an individual employment decision, for whenever one person is selected, others are necessarily left out. Ultimately, all affirmative action programs are implemented in reference to specific jobs and appointment decisions. If the Court's approval of the concept of affirmative action were to be cast aside here on the ground that another individual's expectations[36] could never be compromised, the Court's decisions in *Fullilove*, *Sheet Metal Workers'*, and *Firefighters* would be eviscerated.

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[36]As an applicant for promotion, Johnson had an expectation of promotion similar to that of any other applicant seeking the job. Johnson cannot demonstrate that he had a right to a promotion based upon his seniority or any other factor. Under its merit system rules, the Agency had the right to pick any of the top seven candidates regardless of whether he or she was the most senior employee or the most qualified.

D. The Agency's Decision to Promote a Well-Qualified Woman to a Position From Which Women had Previously Been Excluded Did Not Violate Petitioner's Title VII Rights.

1. The Selection of Joyce was a Reasonable and Well-Founded Exercise of Remedial Discretion.

The statistical evidence of underrepresentation of women focused attention on the skilled craft and other nonclerical jobs in the Agency's Roads Division.[37] Special consideration of women applicants for these jobs, and no more, is a particularly appropriate method of seeking to remedy the exclusion of women. Moreover, as the Agency Director was aware, charges of sex discrimination had been made against the Agency, including some in reference to skilled craft positions. Tr. 42-43. *See supra*, p. 9.

Graebner, the Agency's Director, had substantial justification to consider Joyce's qualifications equal to those of the Petitioner. Tr. 25, 54, 69, 75.[38] Graebner con-

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[37]The Petitioner and others persist in claiming that the Road Dispatcher job was not a skilled craft job (Pet. Br. 37; U.S. Br. 26-27, n.18). However, no support for that assertion exists in the record or in the decisions of the lower courts. The Road Dispatcher job clearly required knowledge and skills which differentiate it from a clerical job. *See* Tr. 32, J.A. 126-27.

[38]We do not suggest that this Court, in order to affirm the Court of Appeals, must or should determine that the District Court was clearly erroneous in finding that Petitioner was better qualified. Pet. 3a. *See Anderson v. City of Bessemer*, 105 S. Ct. 1504 (1985). Rather, we believe that the District Court applied incorrect legal standards in giving decisive weight to those findings. Under the correct Title VII standards discussed in section A of this Argument, pp. 13-18, *supra*, the evidence shows that the Directors promotion decision was fully consistent with the remedial discretion permitted by Title VII.

sidered them both qualified, and found no significant variation between their interview scores. Tr. 24, 57-58. He evaluated their experience and found it, while different, of equal value. Tr. 75.[39] Both had experience as a road maintenance worker for the Agency and both had experience as a road yard clerk, where both performed Road Dispatcher duties. J.A. 27; Tr. 103, 106.

While the Director ultimately gave decisive consideration to gender, he did so only after considering all the other relevant factors. Graebner testified that while "the opportunity to contribute to meeting our stated affirmative action goals did have an impact" (Tr. 68), he considered a "combination" of factors with an emphasis on their qualifications. Tr. 58-59, 68-69, 70. He also testified that, "if her . . . qualifications [had] been less by a large margin, sex may not have meant anything." Tr. 69. Graebner appropriately exercised his discretion as Director in determining the weight to be given to each factor, including consideration of gender.

The Director had more than sufficient grounds to conclude that the Agency's Plan was properly founded on a need to remedy the effects of its past practice, and that the vacant job in question offered a particularly appropriate occasion for "special consideration." Moreover, the availability of a well-qualified female applicant made the exercise of "special consideration" fully consistent with the Agency's merit system rules in this case. In these circumstances, Joyce's selection was a modest

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[39]The District Court overlooked this evidence in finding that Graebner had only considered their test scores. Pet. 3a, 12a. In fact, the District Court's own qualification finding was based on the examination and interview scores alone. Pet. 12a.

and appropriate first step pursuant to a Plan whose virtue is flexibility and adaptability to specific situations.

If Title VII is read to prohibit the application of the affirmative action plan here, then it is difficult to imagine any circumstances in which the application of affirmative action principles to a particular promotion decision could ever occur. Such a limited reading of Title VII, as Petitioner urges, is wholly at variance with the thrust of this Court's affirmative action holdings since *Weber* and, indeed, of the entire remedial thrust of the statute.

2. Petitioner Failed to Carry His Burden of Proof that the Agency's Action was Unlawful.

The allocation of the burden of proof is well-established in an individual Title VII case alleging disparate treatment. First, the plaintiff must establish a *prima facie* case of discrimination. The employer is then required to articulate legitimate reasons for its action. The plaintiff must then prove that the reasons were a pretext for discrimination or otherwise unlawful. *At all times the plaintiff bears the ultimate burden of proof. McDonnell Douglas v. Green,* 411 U.S. 792, 802-05 (1973); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

The allocation of the burden does not change just because the case is brought in a "reverse discrimination" context and involves a challenge to an affirmative action plan. "The ultimate burden remains with the employees

to demonstrate the unconstitutionality of an affirmative action program." *Wygant*, 106 S. Ct. at 1848.

Rather than applying this allocation of the burden of proof, Petitioner and the United States suggest that the burden of proof should be on the *employer*: "[T]he presumption should be that affirmative action is unlawful and the employer should as a matter of policy carry the burden of showing that it is *not unlawful* under these circumstances." Pet. Br. 48; *see also*, U.S. Br. 17. This suggestion finds no support in the decisions of this Court.

The Agency's initial burden in this case was to articulate a substantial evidentiary basis for concluding that remedial action was necessary. This burden was met by the introduction of substantial evidence, both in the form of statistics and testimony concerning Agency practices, from which an inference of discrimination could be drawn. *See* discussion *supra*, pp. 18-25. When the Agency introduced its statistical proof as to the Plan's remedial purpose, it thereby supplied the court with the means for determining that the Agency had a firm basis for concluding that remedial action was appropriate. It was then incumbent upon the Petitioner to prove his case; he continued to bear the ultimate burden of persuading the court that either the Agency's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the Agency's affirmative action violated Title VII. *See Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring).

The Petitioner made no attempt to rebut the Agency's statistics or the evidence of its practices. Indeed, the Petitioner did "not challenge the existence of the affirmative action plan . . . , but simply challenges the way that [it] was used . . ." in this case. Tr. 5. He failed to pre-

sent any evidence that the Agency Plan lacked a remedial purpose.

The Agency's next burden was to show that its affirmative action was was appropriately tailored to the remedial need and not excessively intrusive on the opportunities of third parties. This burden was met by the introduction of the Plan documents and by testimony concerning its flexible, case-by-case method of implementation. Petitioner then had the burden, which he failed to meet, to prove that the Agency Plan violated Title VII.

Having failed utterly to demonstrate that the Agency's Plan was either unfounded or improperly applied, Petitioner has not met his burden of proof, and cannot prevail. Accordingly, the judgment of the Court of Appeals should be affirmed.

Remand should not be necessary since the Agency met its burden to justify its action, to which there was no effective rebuttal. If, however, a remand is ordered, the Court should address the burden of proof issue in order to affirm the Court of Appeals allocation of the burden.[40]

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[40]As the panel held, 770 F.2d 758 & n.4, Pet. 30a n.2, 31a n.4, the District Court erred in placing the burden on the Agency to prove that its plan complied with Title VII. Even the dissent in the Ninth Circuit, 770 F.2d at 762-63 (Wallace, J., concurring in part and dissenting in part), and the United States concede that the District Court did not properly address the factual predicate of the Agency's Plan. U.S. Br. 23. The District Court stated that the Agency had failed to carry a portion of *"its burden"* of proving a history of discrimination, although this was not the critical factor in the District Court decision. Pet. 9a-10a. Instead of deciding whether the Agency had proven its own discrimination, the District Court should have assessed whether the Agency produced a firm factual basis to justify the taking of remedial action. *See* discussion *supra*, pp. 18-25.

II. PETITIONER'S BELATED FOURTEENTH AMENDMENT EQUAL PROTECTION ARGUMENT SHOULD BE REJECTED

A. Since It Was Not Raised Below, the Fourteenth Amendment Argument Should Not Be Considered Here

Petitioner argues here for the first time that the Equal Protection Clause of the Fourteenth Amendment requires the Agency to meet a higher standard of proof than the Court has previously required of an employer who has taken voluntary affirmative action under Title VII. Pet. Br. 19-23; *see also* U.S. Br. 9-10 n.5. This Court should emphatically refuse to address this question.

This is a Title VII case only. The Equal Protection Clause was not mentioned in the Complaint, not argued in the District Court of the Court of Appeals,[41] and not raised in the Petition for Certiorari. It is improper to address an issue which was not raised below and was not comprised within the question presented in the Petition. Supreme Court Rule 21.1(a); *Lake County Estates v. Tahoe Planning Agency*, 440 U.S. 391, 398 (1979); *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 324-25 (1972). A Writ of Certiorari was recently dismissed as improvidently granted because the case turned upon a question not raised below. *EEOC v. Federal Labor Relations Authority*, 106 S. Ct. 1678, 1681 (1986).

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[41]The Ninth Circuit expressly noted that equal protection issues were not raised. Pet. 29a, n.1, *referring to Johnson*, 770 F.2d 752, 754 n.1 (9th Cir. 1985). Both the District Court and the Ninth Circuit analyzed this case as Petitioner presented it below, *i.e.*, solely as a Title VII case governed by *Weber*.

B. Even When Tested Under the Fourteenth Amendment, the Agency's Action Withstands Scrutiny

Although we believe it improper for Petitioner to have raised the Equal Protection issue here for the first time and we are hesitant to address this issue at this time without the guidance of the lower courts, we are *not* reluctant to say that the Petitioner's analysis is both confusing and wrong. The confusion arises from Petitioner's eagerness to avoid what he perceives as a possibly anomalous result that sex reverse discrimination cases might be treated differently than race cases. Pet. Br. 23. If there is such an anomaly, it is not present here. When analyzed under Constitutional standards, the Agency's action withstands scrutiny.

In sex discrimination cases, this Court has not adopted a "strict scrutiny" analysis. Sex classifications have not been viewed as comparable to suspect racial classifications for purposes of equal protection analysis. *Craig v. Boren*, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-26 (1982).

At most, the Court subjects sex discrimination cases to an intermediate level of scrutiny, under which the following two questions are asked: First, is there an important governmental objective? Second, does the action taken substantially relate to that objective? *Id.* at p. 725. Here, both questions must be answered in the affirmative.

There was an important governmental objective to be served by the Agency's Plan. Congress's enactment of Title VII establishes beyond question that providing reme-

dies for sex discrimination is an important government objective.[42]

The Agency's action here also satisfies the second prong of the "intermediate scrutiny" test: consideration of underrepresentation of women substantially relates to the objective of remedying sex discrimination, *Bakke*, 438 U.S. 265, 407 (Blackmun, J.). By being sensitive to underrepresentation of women, the Agency can determine whether or not employment and promotion barriers affect particular jobs or a particular division of the Agency. The most effective remedy can be provided by analyzing the prob-

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[42]The purpose of Title VII was "to open employment opportunities for [minorities and women] in occupations which have been traditionally closed to them." *Weber*, 443 U.S. 193, 203 (*citing* 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey). In *Teamsters* the Court also discussed the import of Title VII, "[t]he primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minorit[ies and women].'" *Teamsters*, 431 U.S. 324, 348 *(quoting McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 800 (1973). *Franks v. Bowman*, 424 U.S. 747 (1976) also emphasizes the important role of Title VII. "[I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin [citations omitted] and ordained that its policy of outlawing such discrimination should have the 'highest priority' [citations omitted] . . . . [O]ne of the central purposes of Title VII is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.'" *Id.* at 763 *quoting Albemarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975).

Title VII's call to remedy employment discrimination has elicited responses at the agency and state levels. All of these enactments are evidence of the importance of Title VII's objective. *See* Affirmative Action Appropriate under Title VII of the Civil Rights Act of 1964, As Amended, 29 C.F.R. §§ 1604-1608.12 (1986); Fair Employment and Housing, Cal. Gov't Code §§ 12940-12948. Thus the important objective of voluntary remedial action is encouraged at every level of government.

lem on a case-by-case basis. On limited occasions,[43] the Agency may even consider gender as a positive factor in making an employment decision.

This case would not be decided differently if it were a race case brought under the Fourteenth Amendment. In race discrimination cases subject to "strict scrutiny," the initial burden of showing a compelling governmental purpose for affirmative action is met if the employer produces "a strong basis in evidence for its conclusion that remedial action is necessary." *Wygant*, 106 S. Ct. at 1848. Evidence of an employer's need to remedy discrimination satisfies both "strict" as well as lesser levels of scrutiny:

> The Court is in agreement that, whatever the formulation employed, remedying past or present discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.

Wygant, 106 S. Ct. at 1853 (O'Connor, J., concurring).

Thus, in Equal Protection as well as Title VII cases, although the analysis differs, a public employer who wishes to take voluntary affirmative action faces essentially the same initial burden: It must produce a solid factual foundation for its belief that remedial action is necessary.

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[43]The Director testified that he had applied affirmative action considerations "probably half a dozen" times. Tr. 53. "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Mississippi University for Women*, 458 U.S. at 728.

Statistical evidence showing underrepresentation of women in a substantial portion of the employer's workforce, together with evidence on which to infer exclusionary employment practices, is sufficient to meet this initial burden under both Title VII and the Constitution. A showing sufficient to support an affirmative action plan under Title VII will thereby establish a compelling basis, as required under the Equal Protection Clause, to take remedial action. *See Wygant,* 106 S. Ct. at 1856 (O'Connor, J., concurring).

With evidence sufficient to support a belief that remedial action should be taken, a public employer may, consistent with its constitutional obligations, take affirmative action to provide a "narrowly tailored" remedy. The Agency's action here was perhaps the most narrowly tailored remedy which could be effective in cases such as this. It calls for a *consideration* of gender and no more. "In order to get beyond racism [sexism], we must first take account of race [sex]. There is no other way." *Bakke,* 438 U.S. at 407. (Blackmun, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

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